

APPEAL NO. 030564  
FILED APRIL 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 28, 2003. The hearing officer determined that the respondent (claimant) suffered a compensable right ankle injury on \_\_\_\_\_; that the appellant (carrier) waived the right to dispute compensability by not contesting compensability pursuant to Sections 409.021 and 409.022; and that the carrier did specifically contest compensability pursuant to "Section 109.022 [sic]" and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.2(f) (Rule 124.2(f)).

The carrier appeals the disputed issues, suggesting that the "Appeals Panel can take judicial notice of the contents of the [Texas Workers' Compensation Commission (Commission)] file," that it timely contested compensability, and that on the merits the claimant's injury occurred at home. There is no response in the file from the claimant.

DECISION

Affirmed.

First, regarding the merits, the claimant, a machinist, testified that as he was leaving work, he stepped off a curb and twisted his right ankle on the way to the employee parking lot. The carrier disputes this, based on a conflicting medical report that indicates the claimant injured his ankle at home. This issue strictly involved a factual determination regarding which evidence the hearing officer found more credible.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's determination on the injury issue is affirmed.

Regarding the carrier waiver issue, Section 409.021(a) provides that the insurance carrier is to begin the payment of benefits or notify the Commission and the claimant in writing of its refusal to pay benefits within seven days after receiving written notice of the injury (the "pay or dispute" provision). The Texas Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) has strictly applied the seven-day "pay or dispute" provision. In evidence is a Payment of

Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 3, 2002, indicating that benefits will be paid as accrued (Cert TWCC-21). Neither the carrier's nor the claimant's copies of this TWCC-21 indicated when it was filed with the Commission. However, an affidavit from one of the carrier's claims specialists certified that the carrier had received first written notice of the claim on May 2, 2002, and that she filed the TWCC-21 the "next day" May 3, 2002. The hearing officer accepted the affidavit and found that the carrier had "filed a TWCC-21 dated 5/6/02 [sic 5/3/02] indicating it would pay as benefits accrued." The hearing officer commented that this TWCC-21 "was sufficient to 'open' the 60-[day] period to dispute compensability." We agree.

Also in evidence are two second TWCC-21s dated June 26, 2002, which disputed the injury as being in the course and scope of employment. As with the other TWCC-21s there is no indication when the second TWCC-21 was filed with the Commission. The affidavit from the claims specialist pertains only the first TWCC-21 dated May 3, 2002. The hearing officer commented:

. . . the carrier did not meet its burden of proof that the TWCC 21 dated 6/26/02 was filed with the Commission within 60 days of the written notice on 5/2/02. Both the TWCC 21s dated 6/26/02 that were placed in evidence by the parties lack a TWCC date stamp and the affidavit by [the claims specialist] does not address the filing date of the TWCC 21 dated 6/26/02. Therefore, the TWCC 21s were sufficient to dispute the claim, but there is insufficient proof that the 6/26/02 [TWCC-21] was filed with the Texas Workers' Compensation Commission within 60 days of the first written notice on 5/2/02 and the carrier has waived its right to contest compensability.

We agree with the hearing officer's application of Section 409.021(a) and the Downs, *supra*, decision.

We would note that it was the carrier's position at the CCH that Downs was not applicable because no benefits had accrued. We disagree. See Texas Workers' Compensation Commission Appeal No. 021153-s, decided June 27, 2002; Texas Workers' Compensation Commission Appeal No. 022983, decided January 8, 2003; and Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. The carrier in its appeal argues that the TWCC-21 dated June 26, 2002, was "received by the Commission on June 28, 2002," however, there is no evidence to support that assertion. The carrier also asserts that the "Commission must take judicial notice of entries within their own computer system." We certainly disagree with that, particularly when the hearing officer was not requested to do so. The carrier argues that a "phone call to the field office customer service proved that the Commission's own computer system" shows the TWCC-21 dated June 26, 2002, was received by the Commission on June 28, 2002. That evidence was not before us, or the hearing officer, and there was no request to make such a call. If such a call was made it was made after the CCH and evidence of such a call was not before us or the hearing officer. The

carrier failed to request such a call and therefore this point was not preserved for appeal. Finally, the carrier argues that the Appeals Panel “can take judicial notice of the contents of the TWCC file.” We disagree and point out that Section 410.203(a) limits our review to the record developed at the CCH and the written appeal and response.

While we are affirming the hearing officer’s decision on the grounds stated by the hearing officer, we have written separately on the carrier waiver issue because there appears to be a misperception of how the Downs decision is interpreted and the scope of the Appeals Panel review.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer’s decision. Cain, *supra*.

The hearing officer’s decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Thomas A. Knapp  
Appeals Judge

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Chris Cowan  
Appeals Judge

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Roy L. Warren  
Appeals Judge